IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-339

FUCHS SUGARS & SYRUPS, INC. and FRANCIS J. PRAEL, doing business as LEWIS & COMPANY,

Petitioners,

—against—

AMSTAR CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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This brief is submitted in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of a judgment of that court which dismissed a broker termination complaint cast as an antitrust claim.

Question Presented

The single issue raised by the Petition does not merit review by this Court. That issue is:

Did the Court of Appeals correctly decide, after reviewing the trial record, that insufficient evidence was presented to support a finding that Amstar's termination of its use of general sugar brokers was the product of an unlawful combination or conspiracy in violation of Section 1 of the Sherman Act?

Statement of the Case

Petitioners ("plaintiffs") commenced this action on July 10, 1974 in the Southern District of New York, claiming that Amstar's termination of its employment of general sugar brokers some three months earlier had violated Sections 1 and 2 of the Sherman Act.* The complaint sought damages as a result of the termination and mandatory reinstatement of plaintiffs' employment relationship with Amstar. Plaintiffs' claims, which are based on termination of employment services, were framed as antitrust issues because they had no employment contracts with Amstar and were retained as agents at will.

Plaintiffs are two "general" sugar brokers with offices in the New York metropolitan area who are employed as sales agents by various sellers of refined sugar and previously were so employed by Amstar (A4).** They are not "distributors," as the Petition erroneously states (p. 4). The Court of Appeals correctly described them as "manufacturers' agents" who "do not purchase or take possession of the manufacturers' goods, bear any of the financial risk for these goods, or possess any discretion as to the pricing of the goods" (A3).

As general sugar brokers, plaintiffs act as sales agents simultaneously for a number of competitors in the sale of refined sugar.*** In contrast, the much more numerous "direct" sugar brokers represent only one principal at a time in the sale of refined sugar products (A4). Amstar

* 15 U.S.C. §§ 1 and 2.

** References to pages of the appendix to the Petition are preceded by the letter "A".

*** Plaintiffs have continued as agents for many sugar sellers other than Amstar. At the time of trial, plaintiff Fuchs represented 22 other sugar suppliers, and plaintiff Prael represented 13 (A6, n.3).

pays its broker agents commissions on Amstar's sales of its sugar for which they submit customers' orders. These commissions customarily are based on the volume of sugar sold rather than on the selling price Amstar receives (A5, n.2).

Sugar brokers (both general and direct) are unlike traditional middlemen, such as dealers and distributors. Ordinarily they merely make telephone calls to attempt to locate customers for their principal, the manufacturer/seller. As the Court of Appeals put it, the function of sugar brokers "is simply to bring a buyer and seller together in the hope of initiating a sale at a price and terms agreeable to both" of the participants (A4).

Manufacturers' sales of refined sugar products with the assistance of general brokers, as plaintiffs observe in their Petition (p. 4), is a vestige of the nineteenth century and in many respects is *sui generis* to the sugar industry and contrary to trends in other food manufacturing sectors. Indeed, one of plaintiffs' own experts at trial characterized the use of general brokers as an "anachronistic way of merchandising" (227a-28a).*

In addition, sales through common sales agents may present antitrust perils due to such brokers' simultaneous access to pricing information from Amstar and its competitors. The trial court found this set of distribution arrangements a "potentially anti-competitive system" (1987a) and therefore declined to order plaintiffs' reinstatement.

Moreover, although plaintiffs were paid commissions by Amstar and purported to act as its agents, they and other general brokers engaged in activities which were solely for the benefit of Amstar's customers and which at times depressed the price Amstar received for its sugar. These

* Citations to "a" pages refer to the Joint Appendix filed with the Court of Appeals.

activities included giving gratutitous recommendations to customers as to the quantity, price and terms for sugar for which they felt such customers should bargain; assisting buyers to "shop" among various sugar sellers for the best prices; obtaining special discounts and allowances from Amstar for certain customers; and advising selected customers of the prices and terms offered by Amstar to other customers. These activities of general brokers sometimes reduced the selling price of Amstar's sugar and Amstar's profit margins, and they prompted the Court of Appeals to conclude that general brokers "at times acted more nearly as purchasing agents for Amstar's customers" than as sales agents for Amstar (A5).

Over a number of years and due to a variety of problems, Amstar had sought to reduce its reliance upon this anachronistic, unprofitable and potentially anti-competitive sales system by hiring more salesmen on its own payroll and hiring additional direct brokers. By the late 1960's, Amstar had increased substantially its employment of direct sugar brokers who represented it in particular geographic areas (A5) and had correspondingly pared down the number of its general brokers.* On March 22, 1974, Amstar announced to the handful of its remaining general brokers that it would terminate use of their services effective March 30 (A5).**

* This evolution is characterized by plaintiffs in their Petition (p. 7) as a "multi-phase five year plan for the control and eventual elimination of general sugar brokers." Contrary to plaintiffs' contention (p. 14), the Court of Appeals did review the rather colorfully-presented evidence concerning Amstar's internal "multi-phase five year plan" and concluded that "the record before us shows no more than a unilateral decision by Amstar to substitute one distribution system for another" (A3).

** Amstar's various distributors, who purchase sugar for resale in the traditional role of middlemen, were unaffected by this broker termination decision.

In the area of plaintiffs' primary activity, New York City, Amstar replaced the brokers with its own salaried salesmen. In certain midwestern and southern cities, a few brokers who formerly had represented others besides Amstar were offered the opportunity to become Amstar direct brokers in their areas (A5). Some rejected the offer and remained the representatives of Amstar's competitors, while others accepted (*id.*).

None of the general brokers terminated by Amstar in April 1974 went out of business, and all continued to represent Amstar's competitors (A5, n.3). Competition among sugar sellers therefore was unaffected. Indeed, senior executives of Amstar's primary competitors in the northeastern United States testified at trial that, rather than suffering adverse effects from Amstar's action, their sales instead promptly increased as a result of efforts by general brokers to shift business away from Amstar and to them (1671a-72a, 1710a, 1765a-66a).

At the conclusion of a three-week trial, the jury rejected plaintiffs' claim that Amstar's termination of general brokers was an attempt to monopolize the sugar market in violation of Section 2 of the Sherman Act (A2). However, upon instruction from the trial court to which Amstar took timely exceptions, the jury found that Amstar's action amounted to a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and awarded single damages of $150,000 (*id.*).

A unanimous Court of Appeals panel* reversed the finding of a violation of Section 1, and a petition for rehearing and suggestion of rehearing *en banc* were denied. After a

* The panel was composed of Judges Lumbard, Moore and Mansfield. Judge Lumbard wrote the court's opinion.

review of the 2307-page record, the Court of Appeals concluded that insufficient evidence was presented to support the jury's finding of a Section 1 conspiracy between Amstar and anyone else to terminate general brokers. As an alternative holding, the Court of Appeals held that sugar brokers were not independent entities with whom Amstar could conspire under Section 1.*

Reasons for Denying the Petition

I.

The Decision Below Does Not Conflict With Any Decision of This Court or of Other Courts of Appeals.

Straining to find some inconsistency between the Court of Appeals' ruling and the decision of this Court in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), plaintiffs have seized upon the Court of Appeals' use of the word "coerce" in its opinion (A13). They have wrenched this single word entirely from its context as the basis for their claim that the court below misapplied *Albrecht* by supposedly ruling that proof of "coercion" is necessary to give rise to a Section 1

* Because of the Court of Appeals' reversal on a finding of an absence of any combination or conspiracy, it did not reach or pass upon other issues raised by Amstar, such as the lack of evidence that Amstar's actions harmed competition or that plaintiffs suffered antitrust injury. Even if the Court of Appeals' judgment were reversed, it would be necessary for that court to address these matters before plaintiffs would be entitled to any reinstatement of the trial court's judgment.

The District Court's statement suggesting that Amstar does not "challenge the sufficiency of the evidence with respect to anti-competitive purpose or effect" (A19) is in error, as is plaintiffs' unsupported statement to this Court that "There is no question that the measures taken by Amstar resulted in a significant reduction of competition in the sugar industry" (p. 16).

agreement (Petition, pp. 16-23). The Court of Appeals made no such ruling, and no inconsistency exists.

The Court of Appeals correctly read *Albrecht* to hold that an unlawful conspiracy may be found on evidence of a joint effort to secure compliance by a terminated distributor (who was in that case an independent economic entity, not a mere broker agent) in some unlawful activity such as resale price maintenance (A13). It is the collaborative effort to extract "some collateral anticompetitive advantage" which the Court of Appeals found essential (A8, A13), not the means by which such advantage was extracted. "Coercion" was not an issue below at all.

Applying *Albrecht* to the facts of this case, the Court of Appeals found no evidence in the record of any attempt by Amstar to secure any anticompetitive advantage. Not only was there no "coercion," but there was not even any joint effort to engage in any conduct which could be illegal: there was no claim that Amstar engaged in any resale price fixing with any of its brokers (A13), nor was there any support for vague allegations that Amstar sought by its termination of general brokers to secure compliance by plaintiffs or any other brokers in any unlawful activities (A13-A14).*

These findings distinguish *Albrecht* and the other decision of this Court cited by plaintiffs in their Petition.** In

* In the principal geographic area served by these plaintiffs, metropolitan New York City, Amstar replaced the general brokers with its own salaried salesmen. By definition, they could not be involved in an improper combination wth Amstar.

** In addition to *Albrecht*, plaintiffs cite (pp. 17, 20-21): *United States* v. *Schrader's Son, Inc.*, 252 U.S. 95 (1920); *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208 (1921); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

each of those cases the challenged activity involved an attempt by a manufacturer to secure adherence by its dealers in an unlawful scheme of resale price maintenance. In the instant case, Amstar sought nothing from its brokers except loyal service as sales agents who did not have a conflict of interest. Such exclusive agency arrangements are long-established and of unquestioned legality, and the false issue of "coercion" is irrelevant. Nothing in the decisions of this Court outlaw a manufacturer's efforts to achieve this goal by unilaterally changing its distribution system.

Similarly, there is no conflict between this case and the decisions of other courts of appeals. The decisions cited by plaintiffs are either inapposite or entirely consistent with the holding below.

In *Blankenship* v. *The Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975), and *Jacobson & Co., Inc.* v. *Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977) (Petition, pp. 24-25), former distributors (who were middlemen with pricing discretion and not mere broker sales agents) brought antitrust actions against their former suppliers claiming that they had been terminated because of their refusal to adhere to certain unlawful restrictions (respectively, resale price maintenance and the allocation of sales territories). Citing *Albrecht* and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), the Ninth and Second Circuits held that retaliatory terminations violated Section 1 if motivated by the dealers' refusal to adhere to unlawful price or territorial restrictions. In contrast here, no distributors were involved at all, no brokers were selectively terminated, and no broker was asked to help Amstar do anything illegal. Rather, an entire segment of a sales system, composed of all general brokers, simply was discontinued. As the Ninth Circuit observed in *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 805 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977):

> "[A] complete conversion is not an enforcement mechanism [for an unlawful restraint], but a choice of an alternative form of distribution."

The decisions in *Bushie* v. *Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), and *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (Petition, p. 24), are in accord with the holding below. In both of those cases, the Ninth Circuit upheld as lawful decisions by suppliers to replace distributors in order to improve their respective distribution systems.

Plaintiffs also point to *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), as a factually similar case (Petition, pp. 24-25); but plaintiffs' reliance is wholly misplaced. In that case the defendant, an exporter of oranges, was found to have conspired with a broker to refuse to deal with competing exporters of oranges in an effort to drive the latter out of business. There is no claim by plaintiffs in this case that Amstar's termination of general brokers had the purpose or effect of driving any competitor out of business, nor of achieving any other identifiable violation of law. To the contrary, Amstar's competitors became the beneficiaries of Amstar's action and enjoyed increased sales after the termination (1671a-72a, 1710a, 1765a-66a).*

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* *Friedman* v. *Thorofare Markets*, 587 F.2d 127 (3d Cir. 1978), and *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974), cited by plaintiffs at pp. 24-25 of their Petition, have no bearing on the issues involved in this case. In *Thorofare Markets*, the Third Circuit ruled that the legality of a restrictive covenant in a shopping center lease should be tested under the rule of reason (587 F.2d at 142-43); and in *Greenville* the Fourth Circuit cited *Albrecht* for the proposition that an officer of a corporation may be found to be a co-conspirator with his corporation if he has an independent personal stake in achieving the corporation's illegal objective. (496 F.2d at 399).

II.

This Case Presents No Substantial Question Under the Sherman Act.

The Court of Appeals held that Amstar did not violate Section 1 of the Sherman Act when it unilaterally discontinued its use of general brokers in the sale of its sugar products. That holding was predicated on two grounds: first, that Amstar acted unilaterally in arriving at its decision to terminate its use of general brokers (A10);* and second, that following the termination Amstar did not conspire with anyone in restraint of trade (A10-A11).

Based on its review of the extensive record, the Court of Appeals ruled that the trial court had misapplied applicable standards and that Amstar lawfully could change its distribution system in order to improve its profitability and could at the same time offer employment to some of its former agents as direct brokers within the new system (A7-A8). As the Court of Appeals stated, "if it is not an antitrust violation for a manufacturer to change his distribution system, then it can hardly be evidence of an illegal conspiracy that the manufacturer seeks merely to secure the personnel to man this new system" (A11).

The Court of Appeals' holding is fully in accord with the long-established principle that a unilateral decision to change distributors does not give rise to a claim under Section 1 of the Sherman Act. *See, e.g., Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert.*

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* The Court of Appeals cited as evidence of the unilateral nature of Amstar's termination decision the fact that Amstar maintained tight security precautions within the corporation concerning the decision and that none of the "co-conspirators" proposed by plaintiffs either took part in the decision or even had advance knowledge of it (A10).

denied, 433 U.S. 910 (1977); *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972); *Anaya* v. *Las Cruces Sun News*, 455 F.2d 670 (10th Cir. 1972); *Bushie* v. *Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963).

As an alternative holding, the Court of Appeals ruled that the sugar brokers identified by plaintiffs as alleged co-conspirators were incapable of conspiring with Amstar as a matter of law because they were not distributors or other independent economic entities (A9). This ruling was based on the evidence presented at trial, which established that the relationship between Amstar and its brokers was one of principal and agent (A9 n.5) and that the function of brokers in sales of Amstar sugar was identical to that of employee salesmen. Such a ruling is entirely consistent with this Court's decisions recognizing that a Section 1 agreement does not arise when an agent simply "agrees" to provide selling services for his principal. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 20-21 (1964); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 160-61 (1968) (Harlan, J. dissenting); *see also, Knutson* v. *Daily Review, Inc., supra*, 548 F.2d at 801-02; *Clemmer* v. *North American Van Lines, Inc.* 1969 CCH Trade Cas. ¶ 72,936 (E.D. Pa. 1969).

In sum, the Court of Appeals correctly applied settled legal principles to the facts of this case. There is no Sherman Act issue which merits this Court's review.

III.

The Decision Below Turned Upon Evidentiary Questions Which Are Inappropriate for Further Review.

In essence, plaintiffs take issue with the Court of Appeals' review of the trial record. By their petition, they ask this Court to sift the evidence anew in search of sufficient factual indicia of improper joint activity. That is not the function of this Court. As Mr. Justice Holmes noted over 50 years ago, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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September 19, 1979